1953

Hyrum Jenkins and Belle Moyle Jenkins v. John B. Morgan et al : Brief of Respondents

Utah Supreme Court

J. Rulon Morgan; Elias Hansen; Attorneys for Respondents;

7826

In the Supreme Court of the State of Utah

HYRUM JENKINS and BELLE MOYLE JENKINS, his wife,
Plaintiffs and Appellants,

vs.

JOHN B MORGAN, WILLIS MORGAN, ALBERT MORGAN, BERT MORGAN, ETHEL G. MORGAN, M. L. BUXTON, and MILO BURSTON,
Defendants and Respondents.

CASE NO. 7826

BRIEF OF RESPONDENTS

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ADDITIONAL STATEMENT OF CASE

The statement of the so-called facts contained in appellants' brief is so limited in its scope that in our view much of the evidence of controlling importance is omitted therefrom. We are unable to agree with appellants' statement made on pages 3 and 4 of appellants' brief, to the effect that the issue involved is whether or not the measure of damage of the value for the use for the withholding of the prop-

erty by the defendants from the plaintiffs is to be based upon the value of use as grazing ground—or the value of the use as agricultural ground.

In our view the fundamental question before this Court is: Does the evidence adduced at the trial require as a matter of law a larger judgment in favor of the plaintiffs than that awarded by the trial court? In order to determine that question it is, in our view, necessary to consider a substantial part of the evidence offered and received at the trial which is not mentioned in appellants' brief. We shall briefly direct the attention of the Court to such additional evidence.

The land involved in this controversy is located near Goshen, in the southwesterly part of Utah County. On September 1947 when a supersedeas bond was executed for the purpose of permitting the defendants in this action to retain possession of the lands for which damage is claimed for the withholding thereof, such lands were, and for many years prior thereto had been, covered with sagebrush and native grasses and weeds (Tr. 77). (Note: We are using the page numbers at the bottom of the Transcript.) It had not been used for raising agricultural crops for at least 30 years prior to time of the trial of this cause (Tr. 65; 95). On May, 17, 1947, plaintiff, Hyrum Jenkins, and one David S. Powelson entered into a contract, Plaintiffs' Exhibit B, whereby it was agreed that Powelson desired to purchase the land involved in this litigation if Jenkins was successful in the litigation to acquire the same. That Jenkins should apply to appropriate water to irrigate the land, that Powelson should, at his own expense, break and level the land and drill for water. That if Powelson secured two second feet of water, he should pay for the land the sum of $500.00,

but if two second feet of water was not obtained and the land was leased for the 1948 crop, Jenkins and Powelson should each receive one-half of the gross rental of the property, and if Powelson operated the property for 1948 then Jenkins should receive one-half of the net profits, excluding the cost of the machinery that might be purchased by Powelson. The agreement further provides that if possession and title was not acquired by September 1, 1947, then an action should be commenced and prosecuted and the parties should share equally in the costs and recovery had for being deprived of the use and possession of the land for 1948 and all subsequent years.

Under date of August 20, 1947, application to appropriate 5 second feet of water was filed with the State Engineer of Utah. On Oct. 23, 1947, publication of notice of application to appropriate water was begun and on Nov. 20, 1947, the publication was completed. The application was approved on Feb. 27, 1948. Proof of appropriation was by the application to be submitted to the State Engineer on Jan. 5, 1950. On March 24, 1950, amendment for change in Point of Diversion was approved. Proof of application of water was not submitted at the fixed time, but on Jan. 7, 1950, the application was reinstated and the time for making proof of beneficial use of the water applied for was extended to Jan. 5, 1952. (See plaintiffs' Exhibit G). On Dec. 6, 1948, the plaintiffs conveyed the land in question to David S. Powelson and Arnold Dewitt Trotter. (See plaintiffs' Exhibit C.)

David S. Powelson, a witness called by the plaintiffs over objection of the defendants, testified in part: That the land was planted to crops in the Spring of 1950; that about 25 acres was planted to potatoes and the remainder to

grain (Tr. 36). That about 75 or 80 acres were planted to dry grain and about 30 acres to irrigated wheat; that the dry grain went about 15 bushel to the acre and the irrigated about 40 bushels (Tr. 37). That in 1946 or 1947 he went over the land with a Mr. Marcellus Palmer, a land specialist (Tr. 38); that they made borings on the land and examined the soil (Tr. 39); that the reasonable rental value of the land that was irrigated was, in his opinion, $30.00 per acre and the land that was not irrigated $10.00 per acre (Tr. 42-43). On cross-examination, Mr. Powelson testified in part: That he did not know of any dry land in Goshen Valley that rented for $10.00 an acre (Tr. 92); that he rented land under the Elberta Irrigation System for $30.00 per acre (Tr. 93). Mr. Powelson was asked these questions and gave these answers:

Q. "Well, it was a matter of speculation into the future how much this land would produce if irrigated or if used as dry land, isn't that correct?"

A. "Well, you can only judge by the results; in the 1950 crops is all."

Q. "Well, you couldn't tell in advance what this land would produce?"

A. "The only thing I could tell was that it was some of the best soil in the valley, and that is a natural consequence of getting good production of crops."

Q. "Well, it depended upon water supply, didn't it?"

A. "Oh yes."

Q. "And it didn't depend upon the weather?"

A. "Oh yes, it would depend upon the weather."

Q. "And also the rain fall and snow fall, is that correct?"

A. "That's right. The dry farm."
Q. "And the sunshine."
A. "The dry farm, yes."
Q. "And also pests, didn't it?"
A. "It depends upon a lot of things, yes." (Tr. 101).

There was also received in evidence an assignment, Exhibit I, by which Mr. David S. Powelson purports to assign to Hyrum Jenkins and Belle Moyle Jenkins all of his claim for damages caused by withholding the land here involved from his possession during the pendency of the appeal. The assignment recites that Mr. Powelson received $10.00 for the assignment, but he testified that he did not receive anything for the assignment, but that he paid $10.00 to Mr. Jenkins' attorney for the assignment (Tr. 104). Later Mr. Powelson increased the amount to $50.00 or $60.00 that he gave to be relieved from all liability in connection with the assignment and the contract (Tr. 105 and 179). Mr. Powelson further testified that he absolutely will not get anything out of this lawsuit even if Mr. Jenkins prevails in getting judgment (Tr. 180). Mr. Powelson also testified that the land in question had a rental value of between 10 and 15c per acre per annum as grazing land (Tr. 41), and also that he developed about 1½ second feet of water when he drilled the well (Tr. 177); that it cost him about $4,000.00 to get the water for the 160 acres (Tr. 103).

There is considerable evidence in the records as to the rental value of the land similar to that here involved, especially for use as grazing land. (See testimony of Merrill L. Oldroyd, who paid either $26.00 or $28.00 per annum for 560 acres (Tr. 50) and $20.00 for another tract of land consisting of 320 acres.) Albert Morgan placed the annual

rental value at 15c per acre (Tr. 121); that he saw the land operated by Powelson while it was planted to grain and potatoes; that in 1951 barley was planted on the land but it was not all harvested (Tr. 132); that he saw the crop that was grown on the land in 1950 and in his opinion the wheat produced was less than 9 bushels per acre (Tr. 129); that he went $9.00 in the hole one year when he planted dry wheat (Tr. 124); that the potatoes raised were very small and about 2/3 of the crop was left on the ground (Tr. 130); that it looked like the crop was burning up between irrigations (Tr. 131); part of the crop planted on the land in 1951 was not harvested (Tr. 132).

Rex White, a witness called by defendant, testified: That he owns land which is two rods north and 240 rods west of the land involved in this litigation, which land is comparable to the land here involved. That in the fall of 1947 he plowed 35 acres of his land and planted it to barley which came up that fall and the following spring, but he couldn't have cut half a peck (Tr. 139). That in 1950 he planted his land to wheat; that it came up in the fall and next spring and looked like he would have a bumper crop, but it burned up during the summer and he could not have harvested half a pound (Tr. 140); that he has leased his 35 acres for $10.00; that the rainfall on his land is about 9.38 inches; that the soil has been tested to a depth of 14 inches; that the rainfall on Powelson's property would be about the same as it is on his land (Tr. 145).

Mr. Trotter, a witness called by the plaintiff, testified that he went onto the ground here involved for the purpose of breaking it up in June, 1949 (Tr. 154). Mr. Trotter, over objection of counsel for the defendants, further testified that in 1950 they got 1200 bushels from the dry land con-

sisting of 80 acres, and 1885 bushels from the 27 acres that was irrigated, and they had 20 acres planted to potatoes (Tr. 155); that he is a grantee in the Deed from Jenkins, but he didn't pay anything for the land, but that he claims an undivided one-half interest in the land with Mr. Powelson (Tr. 158).

Edgar Finch testified that land such as that here would rent at about 10c an acre and might rent for as high as a quarter an acre. That he does not know of any dry farming in the vicinity of Goshen (Tr. 182). Milton Buxton, a witness called by the defendants, testified that he has rented land similar to the land here involved for 3c per acre (Tr. 182) and another tract for 4c per acre (Tr. 193). That land in that vicinity sells for about $15.00 per acre (Tr. 195-6). That he does not know of any dry land in Goshen Valley having been rented for dry land farming (Tr. 196).

Ned Okelberry, a witness called by defendants, testified that he bought 240 acres of land in the vicinity of the Jenkins property in 1944 or 1945 for $2.50 per acre (Tr. 199-200). That he rented land near the Jenkins land in 1947-1948 from the Tintic Standard Mining from 5 to 15c per acre; that this land is better for grazing than the Jenkins land; that he does not know of any land having been rented in Goshen Valley for dry farming (Tr. 201).

Milo Burriston testified that the Jenkins land was fit for grazing and as such has an annual rental value of 15c per acre; that he did not know of any land in Goshen Valley that had been successfully used for dry land crops (Tr. 204).

Willis Morgan, one of the defendants, testified in his own behalf: That the Jenkins property was fenced in 1949 (Tr. 207); that no crops were grown on the land in 1949;

that crops were planted on the land in 1950 (Tr. 208); that some potatoes were planted but 2/3 of the crop was left on the ground (Tr. 209); that in 1951 the land was planted to barley but part of the crop was not harvested; that he rented 640 acres of land just North and West of the Jenkins land by paying the taxes (Tr. 211-212); that the land is good spring pasture for cattle and better than the Jenkins land; that he had a conversation with Mr. Jenkins in 1947 in which he said that he was not interested in his land and would not spend a dime on it (Tr. 213); That the total tax on the property here involved was $6.52 in 1948, $6.21 in 1949, and $6.14 in 1950 (Tr. 215).

Bert Morgan testified that the reasonable rental value of the land here involved in 1947 and 1948 was not to exceed 15 cents per acre per annum (Tr. 221); that he rents 500 acres for $25.00 for grazing (Tr. 222).

John B. Morgan, one of the defendants, testified in his own behalf, that he rented the land described as Defendants' Exhibit 2, consisting of 247 acres for $36.00 per year; that the land so rented is a little less than one-half mile north of the Jenkins property (Tr. 229); that the Jenkins property cannot be used for grazing more than 2 or 3 weeks because that is as long as the feed lasts; that the 247 acres which he leases for $36.00 per year is much better than the Jenkins property for grazing (Tr. 230); that he owns land all around that of Jenkins; that his ground has sagebrush growing on it the same as the Jenkins land; that the rental value per acre per year is not to exceed 15c (Tr. 232); that he is paying $200.00 per year for 43 acres of irrigated land which is situated 2½ miles North of the Jenkins land (Tr. 233).

We have directed the attention of the Court to the foregoing evidence which is not in any sense a complete transcript, but as this is an action at law, the evidence so referred to, as we view it, is more than ample to support the judgment rendered by the trial court.

ARGUMENT

We shall discuss the two points which plaintiffs designate in their brief as the basis of their claim that the judgment appealed from should be reversed in the order in which the same are mentioned in appellants' brief. It is, of course, elementary that this, being an action at law, the findings of the trial court must be sustained if there is substantial evidence to sustain the same. Such is the mandate of Article 8, Section 9 of our State Constitution, where it provides that the appeal (from District Courts) shall——"in case at law be on questions of law alone." Such is also our statutory law and the repeated and uniform holding of this Court. U. C. A. 1943, 104-41-1 and cases cited in foot notes thereto in Vol. 6, page 392, note 49.

ANSWER TO POINT ONE

THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE BASIS FOR DETERMINING THE DAMAGES SHOULD BE THE RENTAL VALUE OF THE LAND AS GRAZING AND NOT AS AGRICULTURAL LAND.

The evidence shows without conflict these facts:

The appeal bond upon which this action is prosecuted was executed on September 2, 1947 (See Exhibit A, which is attached to plaintiffs' Complaint R. 5-8). The Remittitur

affirming the cause was filed in the District Court on Sept. 9, 1948. It is so alleged in plaintiffs' Complaint (R. 4). And so found by the trial court (R. 14). Thus the plaintiffs were deprived of the possession of the land for one year and one week. It was not until Feb. 27, 1948, that the application to appropriate water on the land was approved (See Plaintiffs' Exhibit G). Thus neither the plaintiffs nor Mr. Powelson could lawfully have drilled a well until after Feb. 27, 1948. Moreover, notwithstanding the plaintiffs or Mr. Powelson could have taken possession of the land on or after September 9, 1948, nothing was done by way of drilling a well for water until along in 1949 and did not start breaking up the land until August, 1949 (Tr. 97). The first crop was planted in 1950 (Tr. 98). The plaintiffs parted with their title on December 6, 1948.

It is thus obvious that the land here in question was not and could not have been used as irrigated land during the time it was owned by the plaintiffs. No claim is made or could reasonably be made that water could have been made available for irrigation for the growing season of 1948. That being so, there is no basis for the claim that plaintiffs are entitled to recover damages on the claim that their land should be considered as irrigated agricultural lands during the time that they were the owners thereof.

The difficulty with the claim for damages on the basis that the land in question should be regarded as agricultural lands lies deeper than the fact that no water could lawfully be made available for the irrigation of such lands for the growing season of 1948.

While Mr. Powelson, a witness for plaintiffs, testified that the reasonable rental value of the Jenkins land as dry land was $10.00 per acre and as irrigated land $30.00 per

acre, other witnesses testified to the contrary, and the surrounding facts belie any such claimed rental value as that testified to by Powelson.

The testimony in this case, some of which we have heretofore directed to the attention of the Court, shows that there is a large amount of land similar to and in the immediate vicinity of the Jenkins property and including the Jenkins property that has never been devoted to the raising of either dry land or irrigated agricutural crops. Throughout the years such of this land as has been leased brought a rental of up to 15c an acre per annum for use as grazing lands. The Jenkins land was of so little value for any purpose that so far as appears, it had never been rented and Mr. Jenkins stated that he would not spend a dime to retain it. If the land had any such rental value as that now claimed by the appellants, it is, to say the least, extremely unlikely that the owners thereof would not have rented it for some such fabulous price as $10.00 to $30.00 per acre, during the time they or their predecessors were the owners thereof. So also if these lands had any such a rental value, it is, to say the least, extremely unlikely that Mr. Jenkins would be willing to sell the same for ½ of income derived therefrom for the year 1948 plus $500.00 if a flow of two second feet of water was obtained by the drilling of a well. That is all that plaintiffs were to receive for the property under the provisions of the agreement, Plaintiffs' Exhibit B, and if possession could not be obtained by September 1, 1947, and a suit was necessary to recover possession, the plaintiffs were, by the contract, obligated to pay one-half of the court costs and were entitled to only one-half of the amount of the recovery. People with property of a rental value of from $1600.00 to $4800.00 a year do not sell their

property for any such pittance as that provided in the agreement, Plaintiffs' Exhibit B. Nor is it likely that one owning property with a rental value of from $1600.00 to $4800.00 a year can get off with the payment of an annual general tax of less than $7.00.

So also if the witness David S. Powelson actually believed that he and plaintiff, Hyrum Jenkins, were entitled to share and share alike damages as provided in Plaintiffs' Exhibit B on the basis of the land having a rental value in the amount testified to by him, it would indeed seem strange that he would be willing to pay the sum of $50.00 or $60.00 to get Jenkins to accept the assignment, Exhibit I, and relieve him from further liability, yet that is the effect of his testimony (Tr. 104-105).

Moreover, the testimony of Mr. Powelson to the effect that the Jap was willing to pay $10.00 for that part of the Jenkins land that was not supplied with water and $30.00 for that which was supplied with water is so improbable that the Court might well have disbelieved the same. It is apparent that the Jap could have rented land without water apparently as good as the Jenkins land for a few cents per acre. There was no land in the immediate neighborhood of the Jenkins land that had been demonstrated to be profitable for raising dry land grain. On the contrary, Albert Morgan had gone $27.00 behind in the operation of 40 acres of dry land in the immediate vicinity of the Jenkins property (Tr. 124). So far as appears, the conversation had with the Jap, testified to by Mr. Powelson, may have been just loose talk. In any event, the Jap did not, so far as is made to appear, examine the land, and the witness Powelson conveniently had the Jap in California at the time of the trial.

Still another fatal weakness to plaintiffs' claim of a right to damages on the basis that the land here involved was fit for raising agricultural crops is the fact that it would be a matter of pure speculation as to whether or not such use would be profitable. Plaintiffs' principal witness, David S. Powelson, so testified (Tr. 100-101).

During the trial, counsel for the plaintiffs stated that the present action was to recover the value of the use of the property as agricultural ground and not for profits that might be derived from its operation (Tr. 111). However, considerable evidence was received over objection of counsel for the defendants which was directed to the question of profits, and some of the cases cited by counsel for plaintiffs in their brief are directed to the question of profits. Indeed some of the language quoted, such as that from the case of Park v. Moorman Mfg. Co., et al, 241 Pac. (2d) 1914, quoted on page 11 of appellants' brief, would seem to indicate that plaintiffs claim the right to recover damages without regard to whether such damages are on the theory of rental value or prospective profits and also without regard to how uncertain, contingent or speculative such damages might be. However, in the case of Moorhead v. Minneapolis Seed Co., 165 N. W. 484, L. R. A. 1918 C 391, cited and quoted from on page 11 of appellants' brief, it will be seen that damages that may properly be awarded must be "free of uncertain, contingent, conjectural or speculative elements." The authorities generally teach that "a party to a contract who is injured by another's breach of the contract, is entitled to recover from the latter damages for all injuries and only such injuries as are the direct, natural and proximate result of the breach, or which in the ordinary course of events would likely result from a breach

and can reasonably be said to have been foreseen, contemplated, or expected by the parties at the time when they made the contract as a probable or natural result of a breach, including gains prevented as well as losses sustained." 15 Am. Jur. Sec. 51, page 449-450, and cases cited in the foot notes.

Another rule applied by the courts as to the measure of damages is thus expressed in 15 Am. Jur. Sec. 55, page 459:

> "In general, it may be said that in measuring the damages for the breach of a contract, a supposedly successful collateral operation that a party might have made if he had not been prevented from realizing the proceeds of the contract at the time stipulated cannot be taken into consideration. This is the rule not only because of the uncertain and contingent issue of such an operation in itself, but because it has no legal or necessary connection with the stipulations between the parties, and cannot therefore be presumed to have entered into their consideration at the time of contracting. It has accordingly been held that the loss of any speculation or enterprise in which a party may have embarked, relying on the proceeds to be derived from the fulfillment of an existing contract, constitutes no part of the damages to be recovered in case of breach, and no recovery can be had for losses resulting from inability to make or carry out a collateral contract, such as the loss of anticipated profits, or for expenses incurred in preparation for its performance, where the party breaking the original contract had not notice of the existing or contemplated collateral agreement."

As to the recovery of profits the law is thus stated in 15 Am. Jur. Sec. 152, page 564:

> "To warrant a recovery for loss of profits in an action for breach of a contract, it must be made to ap-

> pear that such loss of profits was the natural and proximate, not the remote, result or consequence of the breach of the contract and such as may reasonably be supposed to have been within the contemplation of the parties when the contract was made as the probable result of its breach. It is further necessary that it be reasonably certain that profits would have been realized except for the breach of the contract. When prospective profits are remote, conjectural and speculative, thy cannot be said to be the direct and unavoidable result of the breach and cannot be recovered."

Numerous cases are cited in the foot notes to the text, which support the same.

Applying the doctrine announced in the foregoing text and the cases cited in the foot notes, there would seem to be no escape from the conclusion that it was at best a matter of speculation as to whether any profits would or could be realized from devoting the land here involved for raising cultivated crops. No success had theretofore been made on any lands in that immediate vicinity and there had been some failures, notably that of Albert Morgan on land adjacent to the Jenkins land (Tr. 124).

We have probably needlessly digressed somewhat from the theory upon which this case was tried and decided. As heretofore pointed out, counsel for the plaintiffs stated at the trial that plaintiffs sought to recover the reasonable rental value of the property and not any profits that might have been realized.

That the sole basis of the recovery by the plaintiffs is the reasonable rental value of the land is further borne out by the bond which provides that if the judgment is affirmed the sureties will be liable for the payment of damages "occasioned by waste and the value of the use and occupancy of

the property from the time of the appeal until the delivery of possession thereof to said plaintiff." The provisions of the supersedeas bond just quoted is in conformity with Rule 73d of Utah Rules of Civil Precedure.

In light of the fact that the land involved in this litigation was not fenced, was in its native state, covered with sagebrush, native grasses and weeds; that such land as had been devoted to raising of dry wheat in the immediate vicinity of these lands had proven a failure; that no permit had been granted, or was granted until the year 1948 by the State Engineer to drill a well for water, and the fact that before the land could be broken up and planted to crops and water secured to irrigate the same it was necessary to spend several thousand dollars and even then the venture might well prove a failure, it is, to say the least, extremely improbable that anyone would pay a rental of more than that awarded by the trial court for the use of the land during the one year and one week that elapsed between the time the supersedeas bond was executed and the time the plaintiffs were restored to the possession of the land. Certain it is that David S. Powelson was not willing, or if he was he did not undertake to pay the plaintiffs any such rental as that to which he testified was the reasonable rental thereof.

Further as to that, even though this Court should not agree with the findings of the trial court, such fact does not authorize this Court to reverse the findings of the trial court in this, an action at law. In this connection, it may be noted that the finder of the facts is not bound to believe opinion or evidence as to the rental value of a tract of land even if such evidence is uncontradicted.

We have read the cases and authorities cited by appellants. So far as we can find, none of them announce any other or different doctrine than is announced in the general principles of law stated by the authorities which we have heretofore quoted. That being so, no useful purpose will be served by a detailed discussion of such cases. At the bottom of page 17 of appellants' brief, the statement is made that plaintiffs should be awarded a judgment for damages for a period of two years. It is said that it was physically impossible to break the ground until September 9, 1948, at which time it was impossible to break the ground for the 1949 crop. If it was impossible to break the ground for the 1949 crop after September 9, 1948, it necessarily follows that it was impossible to break the ground after September 2, 1947, for the 1948 crop. It will be seen that the plaintiffs were deprived of the use of the land only one week more than one year.

There is a total absence of any evidence that the rental value of the property in question for one week is equivalent to its rental value for a whole year or that plaintiffs sustained damage for a whole year because defendants had possession of the land for a week beyond the year.

An attempt was made to show that a man was available to break up the land in September of 1947, but was not available in September of 1948. Obviously, the availability or lack of availability, even if contrary to defendants' evidence, if true, such fact is not a proper element to consider in awarding damages.

ANSWER TO POINT II

THE COURT DID NOT ERR IN STRIKING THE TESTIMONY OF PLAINTIFFS AND THEIR WTNESSES TOUCHING THE QUESTION OF WHAT HAS BEEN DONE WITH THIS PROPERTY SINCE THE DEED WAS MADE FROM JENKINS TO POWELSON AND TROTTER ON DECEMBER 6, 1948, OR IN STRIKING ALL OF THE TESTIMONY PERTAINING TO AN ORAL CONTRACT OR CONVERSATION BETWEEN POWELSON AND THE JAP, WHICH WAS RECEIVED AS BEARING ON THE RENTAL VALUE OR VALUE OF THE USE OF THE PROPERTY (Tr. 262).

Beginning on page 18 of appellants' brief, complaint is made because the court struck some evidence which plaintiffs claim to be pertinent to determine the use of the property involved in this action. While the appellants fail to point out with particularity the evidence which they claim was improperly stricken, we assume it was the testimony above referred to. There seems to be no other testimony stricken that could be meant.

We have no quarrel with the statement of counsel for plaintiffs to the effect that one who is deprived of the use of his property is entitled to damages on the basis of the reasonable rental value of his property when used for the most profitable use for which the property is adapted. We, however, are unable to see how that fact supports plaintiffs' claim that the Court should consider facts that occurred after plaintiffs had been put into possession of their property and after they had parted with their title to the property. So far as appears, there was no one in the Goshen Valley or interested in renting land therein who was

possessed of the attainments of a clairvoyant. As we have heretofore pointed out in this brief, plaintiffs are, according to their pleading and the statement of their counsel, seeking to recover the reasonable rental value of their land during the time they were deprived of the use thereof. That is to say, such rental as a person who is willing but not required to rent will pay in a transaction or lease agreement with one who is willing but not required to let the land.

Obviously persons without the faculty of foreseeing into the future could not be influenced in making a contract for the lease of a tract of land far in excess of the going price. Certain it is that the plaintiffs were not possessed with such attainments, or they would not have sold for a mere pittance a tract of land which, according to the statement of their attorney on page 21 of their brief, had an annual rental value of $2810.00. Nor did the court below err in striking the testimony of the witness David S. Powelson as to the alleged conversation of the Jap as to what the Jap would pay for the rental of the Jenkins property. City of St. Louis v. Gerhart Realty Co., 40 S. W. (2d) 661; 328 Mo. 103; Consolidated Gas Service Co. v. Tyler, 63 Pac. (2d) 88; 178 Okl. 325. U. S. v. Meyer C. C. A., 111, 113 F. (2d) 387. Sharp v. U. S. 191 U. S. 341; 24 S. Ct. 114. This Court in the case of Ogden L. and I R. Co. v. Jones, 51 Utah 62; 168 Pac. 548, at page 551 of the Pacific Reporter says that it is improper for a land owner in a condemnation proceeding to testify to an offer made for the land sought to be condemned.

For the court below to have given any weight to the testimony of the witness Powelson as to the offer claimed to have been made by the Jap, would have been wholly unjustified. At the time of the trial, the Jap was in California

and not available as a witness. If he had been questioned about the alleged conversation, we, of course, do not know what his testimony would have been. However, it is certain that he would not pay any such rental as that testified to by Mr. Powelson until the land was cleared of brush, nor is it claimed that he would have paid a rental of $30.00 an acre for land until water was available. As is said by some of the cases above cited, it would open wide the door to fraud to admit evidence of an offer to buy or lease land, and in our investigation we have found no case that has approved the admission of such evidence.

We submit the judgment appealed from should be affirmed with costs to respondents.

Respectfully submitted,

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Attorneys for Respondents